NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GUADALUPE JAIME FAVELA, Defendant-Appellant.	No. 00-15689 D.C. Nos. CR-98-05530-MDC CR-94-05044-EDP MEMORANDUM* (Filed Jan. 25, 2002)

Appeal from the United States District Court
for the Eastern District of California
M. D. Crocker, Senior Judge, Presiding

Argued and Submitted January 15, 2002
San Francisco, California

Before: GOODWIN and TROTT, Circuit Judges, and EZRA,** District Judge

Guadalupe Favela ("Favela") appeals the judgment denying his 28 U.S.C. § 2255 petition. Favela alleges that the trial court's decision to admit testimony of a non-testifying co-defendant, and his counsel's failure to object to such testimony, violated his Sixth Amendment right to confront witnesses and his right to effective assistance of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable David Ezra, United States Chief District Judge for the District of Hawaii, sitting by designation.

counsel. Favela further alleges that his counsel's assistance was rendered ineffective because the Government did not timely disclose impeachment evidence on a prosecution witness. Finally, Favela contends that the trial court erred by admitting his confession for impeachment purposes even though, at the time of his confession, the government promised Favela not to use his statements against him. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and affirm.

Because the parties are familiar with the factual and procedural history of this case, we will not recount it here except as necessary to explain our decision.

I. No *Bruton* error

Favela contends that he was denied his confrontation rights when the district court admitted testimony of Luis Valenzuela ("Valenzuela"), a government informant, in violation of *Bruton v. United States*, 391 U.S. 123 (1968). Favela further contends that his counsel rendered ineffective assistance by failing to object to parts of Valenzuela's testimony while objecting to other parts of the testimony on hearsay rather than on Sixth Amendment grounds.

A defendant is deprived of his Sixth Amendment right of confrontation when a facially incriminating confession of a non-testifying co-defendant is introduced at their joint trial. *See Bruton v. United States*, 391 U.S. at 126. However, statements seemingly protected under *Bruton* can be admissible if they contain "particularized guarantees of trustworthiness." *Lilly v. Virginia*, 527 U.S. 116, 137 (1999); *United States v. Boone*, 229 F.3d 1231, 1233 (9th Cir. 2000).

Because the circumstances attendant to the making of Corral's self-incriminating statements provide a sufficient guarantee of trustworthiness, the statements were properly admitted, and Favela's counsel did not render ineffective assistance by failing to object to the testimony on Sixth Amendment grounds.

II. No *Brady* violations

Favela contends that the Government prejudiced his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce two pieces of impeachment evidence against prosecution witness Manuel Leon: (1) police reports and a search warrant regarding Leon's arrest in 1992 for drug trafficking; and (2) Leon's written plea agreement with the Government.

The Government violates the Due Process Clause when it fails to disclose material evidence favorable to a defendant. *See Brady v. Maryland*, 373 U.S. at 83. When the *Brady* material concerns impeachment evidence against a government witness, *Brady* error is avoided so long as the defendant can present the evidence to the jury and can fully cross-examine the witness. *See United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996).

Even though the Government improperly complied with its discovery obligations, its untimely production resulted in no prejudice. Favela's counsel received Leon's arrest records prior to cross-examination, and made use of the information to elicit testimony from Leon regarding his 1992 arrest, his guilty plea, and the terms of his plea agreement. There was no *Brady* error.

III. Favela's post-arrest statements

Favela contends that his post-arrest statement to Agent Rodriguez was admitted into evidence in violation of his Fifth and Sixth Amendment rights. Favela argues that his confession was given involuntarily and was therefore inadmissible under *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978).

By promising Favela that his statements would not be used against him, Agent Rodriguez interrogated Favela in violation of his *Miranda* rights. *See California Att'ys for Crim. Just. v. Butts*, 195 F.3d 1039, 1047-48 (9th Cir. 2000) (en banc). However, Favela's self-incriminating statements became admissible to impeach him when he chose to testify falsely. *See United States v. Havens,* 446 U.S. 620, 627-28 (9th Cir. 1980).

AFFIRMED.

APPENDIX
B

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff-Respondent, vs. GUADALUPE JAIME FAVELA, Defendant-Movant.	) CV F-98-5530-MDC) (CR F-94-5044-EDP))) MEMORANDUM) AND ORDER) DISMISSING) MOTION TO) VACATE SET ASIDE) OR CORRECT) SENTENCE) PURSUANT TO) 28 U.S.C. § 2255

This motion pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside or correct sentence was timely filed on May 15, 1998. Defendant, hereinafter referred to as "Favela," was subsequently granted two extensions of time to file points and authorities in support of the motion. On August 20, 1998, Favela submitted an Amended Motion which included points and authorities in support thereof, together with a motion for an extension of time seeking leave to amend his previously filed motion. On October 16, 1998, Attorney Ezekiel E. Cortez submitted a notice of general appearance on behalf of Favela, and on November 6, 1998, counsel requested an extension of time to substantially supplement Favela's *pro se* motion. Counsel's motion was granted with instructions to include in the second amended petition any and all claims Favela desired to make, as the amended petition would supersede the previous petitions filed in this matter. The Amended

Petition was filed December 21, 1998. The Government thereafter filed its opposition and Favela filed a traverse.

Favela sets out nine grounds for relief. He alleges (1) ineffective assistance of counsel for failing to object to a co-defendant's statements incuplating [sic] Favela; (2) Favela's confession was admitted in violation of the Fifth and Sixth Amendments; (3) Government failure to timely provide the plea agreement for one of its witnesses; (4) violation of Favela's due process rights when the Government breached an alleged promise not to use Favela's statements against him; (5) ineffective assistance of counsel at sentencing for failure to require the government to prove the type of methamphetamine involved; (6) sentencing error for applying a two-level enhancement in Favela's base offense level; (7) ineffective assistance of counsel when counsel elicited prejudicial testimony from a government witness during cross-examination; (8) ineffective assistance of counsel in cross-examination of Emma Meraz; and (9) the testimony of accomplices who testified for the government violated federal law and should have been suppressed pursuant to 18 U.S.C. § 201(c)(2).

Favela seeks an evidentiary hearing on any factual disputes which may arise following the response by the Government.

PROCEDURAL AND FACTUAL BACKGROUND

Favela and five co-defendants were charged in a six-count Second Superseding Indictment with engaging in a Continuing Criminal Enterprise, and trafficking in methamphetamine. Favela was charged in all six counts, as follows: Count One – violation of 21 U.S.C. § 848. Engaging in a Continuing Criminal Enterprise; Counts

Two and Five – violation of 21 U.S.C. §§ 846 and 841(a)(1), Conspiracy to Manufacture, Distribute and Possess with Intent to Distribute Methamphetamine; Counts Three, Four and Six – violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Distribution of Methamphetamine and Aiding and Abetting; Possession of Methamphetamine with Intent to Distribute and Aiding and Abetting; and manufacture of methamphetamine and Aiding and Abetting. A jury convicted Favela of all counts, and he appealed his sentence. The appellate court affirmed the sentence, but remanded directing that the conspiracy counts be dismissed in light of his conviction on the Continuing Criminal Enterprise charges.

The investigation into this case began in February, 1994, after agents of the California Bureau of Narcotics Enforcement (BNE) learned of a methamphetamine laboratory located on property in Dunlap, California, owned by Favela. The lab was seized and Favela and others were arrested. One co-defendant, Ramiro Ramirez, became a cooperating witness. Manuel Leon was also a cooperating witness but was not a codefendant in this case.

Through subsequent investigation, Agents learned that Favela had been manufacturing methamphetamine since 1991. According to Leon, he and Favela began manufacturing methamphetamine in Southern California in April of 1991.

Leon testified at trial that he and Favela participated in two cooks in San Pasquale, California, two cooks in Fallbrook, California, and two cooks in Rainbow, California. Leon indicated Favela was in charge of the operations

and Leon performed jobs including manning a police scanner, and later he began delivering drugs and money.

Favela moved his operation to Snelling, California in late 1991. Leon and Ramirez worked with him at this location along with about ten other persons. Four cooks occurred on this property where Emma and Jose Esparza resided. Jose Esparza allowed Favela to operate the lab. In February, 1992, law enforcement executed a search warrant on the property where evidence of the lab was found.

Favela moved his operation to Pixley, California, where approximately four cooks occurred. Thereafter, the cooking process went back to Escondido. Ramirez initially worked with Favela in Escondido, but between February and August of 1992, he performed no work for Favela. In March of 1993, Ramirez stated that Favela would not let him cook for him until he spent some time working in the fields. Favela subsequently moved his operation to the Millwood Road ranch in Dunlap, California.

Investigation further revealed that Favela received substantial income from this activity. He used large amounts of cash to purchase real estate. He purchased a piece of property in Fowler, California, in 1992, for $115,000. He purchased the Millwood Road ranch in Dunlap with a down payment of $40,000. He also gave another individual $40,000 cash, plus a $45,000 cashier's check in 1992 to purchase an olive ranch, although he did not put that property in his own name. Favela also purchased a residence in Sanger in 1993, with a down payment of $64,000, and rented an alfalfa ranch in 1993 for $25,000.

The record indicates that from about August 8, 1993 until March 8, 1994. Favela, Norberto Franco, Ignacio Acosta-Torrez, Francisco Carbajal Arias, Concepcion Ramirez-Gonzalez, Benjamin Corral and Ramiro Ramirez conspired to manufacture and distribute methamphetamine.

On February 24, 1994, BNE undercover agents began negotiating with Franco to purchase cocaine, heroin and methamphetamine. Torrez drove Franco to a meeting with agents, and Franco indicated he could obtain methamphetamine from a laboratory located in Dunlap, California. Franco discussed the sale of methamphetamine and the purchase of ephedrine from the agents. It was agreed that Franco and Torrez would take a confidential informant (CI) to a clandestine lab to purchase a pound of newly manufactured methamphetamine for $5,600. Torrez went to an address in Sanger determined to be Favela's residence, where he picked up Francisco Arias and then returned to join Franco, Torrez and the CI. Franco, Torrez and Arias drove the CI to the Millwood Road ranch in Dunlap, which was owned by Favela. All parties went into a residence and the CI observed Arias retrieve a gram scale and canister from a room. Arias weighed out about one pound of methamphetamine and wrapped it. The CI observed approximately six additional pounds of methamphetamine inside the canister. Franco, Torrez, Arias and the CI returned to where the undercover agents were parked and Franco gave one of the agents the pound of methamphetamine in exchange for $5,600 in currency. The agents had previously recorded the serial numbers of this currency.

On March 8, 1994, agents met with Franco after negotiating the purchase of ten pounds of methamphetamine in exchange for $15,000 and one 55-pound tin of ephedrine. The ephedrine was intended for use by the residents of the Millwood Road ranch. Franco waited for the arrival of Torrez before taking the agents to the ranch to transact the deal. Franco and Torrez were arrested at that time.

A search warrant was served on the same day at the Millwood Road ranch. A methamphetamine laboratory was found. Items seized included chemical containers, freon, red phosphorus, a 50-gallon separator drum, caustic soda and two five-gallon buckets of liquid methamphetamine.

Ramiro Ramirez and his common-law wife, Virginia Ortiz, were in the residence. Alfredo Barquero, Concepcion Ramirez-Gonzalez and Francisco Arias were also present. Agents found $4,000 inside Virginia Ortiz's purse which was located in a bedroom that she and Ramiro Ramirez occupied. A gram scale, three rifles and an assault rifle were also found in the bedroom. In addition, $14,000 in currency was found in a dresser drawer. Ortiz informed agents that Ramirez had given her the money and she was to give it to Favela.

In another bedroom agents found $970 inside a pair of pants belonging to Arias. $500 of that money was identified from the serial numbers as part of the currency used by agents to purchase the one pound of methamphetamine on February 24, 1994.

All parties at the residence were arrested. Ramirez told agents he began working for Favela at the Millwood Road ranch shortly after December 1992. In the beginning

he only transported chemicals to the lab site. Ramirez generally was provided with the chemicals by codefendant Benjamin Corral. Sometimes Corral delivered the chemicals to Ramirez himself, and at other times Corral had other persons working for him bring the chemicals to Ramirez. Ramirez then transported the chemicals to the lab. This occurred every one or two weeks for about eight months. Ramirez received between $4,000 and $6,000 for performing this job.

Ramirez also told agents that he participated in six or seven cooks at the Millwood Road ranch. Arias and Torrez also participated in some of the cooks. Ramirez kept track of the number of reaction vessels used in each cook of which he was aware. This totaled 52. The first cook Ramirez was aware of occurred on April 24, 1993.

After his arrest, Ramiro Ramirez gave Agent Moses Rodriguez the telephone number for Benjamin Corral. Agent Rodriguez gave Luis Valenzuela, a confidential informant, this pager number and instructed him to contact Corral. When Valenzuela made contact, he told Corral that Favela had given him the pager number. Corral asked about Favela, and Valenzuela responded that he was still under arrest. Valenzuela asked to meet with Corral to make a deal, telling Corral that Favela had told him about Corral's business. Once Corral and Valenzuela met in person, Corral told Valenzuela that he often transported equipment for Favela, who was his good client. Corral expressed a desire that he and Valenzuela continue doing business in the future, and wanted to find a place where they could work. Corral also discussed selling Valenzuela equipment used to manufacture methamphetamine, including four "ovens," four "pots," and four "regulators" for temperature control. Corral also discussed

selling Valenzuela ephedrine and "acid," both chemicals used to manufacture methamphetamine.

Corral was arrested in May 1994, after negotiating to sell chemicals and glassware to be used to manufacture methamphetamine. He had in his possession four pounds of methamphetamine which he tried to sell to the agents. Corral told agents that the chemicals were transported to Favela at least two times per month, and that every delivery was for at least 10 large containers of freon.

BNE Criminalist Mark Kalchek analyzed the lab found at the Millwood Road ranch. He determined that between ten and fifteen pounds of methamphetamine could have been produced from the solution found on the property when the search warrant was executed. He further stated that all chemicals necessary were present to convert the solution to methamphetamine. An analysis of the methamphetamine sold to undercover agents on February 24, 1994, revealed that the drug was pure and weighed .382 grams.

APPLICABLE LAW

Favela alleges claims of ineffective assistance of counsel and various due process and fair trial claims, including prosecutorial misconduct, violation of his right to confront witnesses, and failure of the Government to disclose exculpatory evidence.

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is demonstrated when

"counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to defendant by the Sixth Amendment." *Id.* There is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." *Id.* at 689. In reviewing counsel's performance, the court "will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994). A tactical decision by counsel with which the defendant disagrees cannot form the basis of an ineffective assistance of counsel claim. *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990). Counsel need not be infallible or recognize and assert every possible defense or argument. *Woratzeck v. Ricketts*, 820 F.2d 1559 (9th Cir. 1988). A decision to waive an issue where there is little or no likelihood of success, and concentrate on other issues is indicative of competence, not ineffectiveness. *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).

Prejudice is established if there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Favela argues that his due process rights were violated because of prosecutorial misconduct, improper admission of testimony and *Brady* violations. In general, due process is violated if the result of the proceeding would have been different absent the alleged wrongdoing. First, prosecutorial misconduct violates due process when it "ha[s a] substantial and injurious effect or influence in determining the jury's verdict." *Ortiz-Sandoval v. Gomez*,

81 F.3d 891, 899 (9th Cir. 1996). To determine if prosecutorial misconduct occurred, it is necessary to examine the entire proceedings and place the prosecutor's remarks in context. *Greer v. Miller*, 483 U.S. 756, 765-66 (1987). To establish a due process violation based on erroneous admission of evidence, a defendant must show that the error rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. *Estelle v. McGuire*, 502 U.S. 62, 67-69 (1991); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Habeas corpus will be granted for erroneous admission of evidence only where the "testimony is almost entirely unreliable and . . . the factfinder and the adversary system will not be competent to uncover, recognize and take due account of its shortcomings." *Barefoot v. Estelle,* 463 U.S. 880, 889 (1983). Finally, with regard to Favela's third due process claim: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Impeachment evidence falls within the *Brady* rule, and is material under *Brady* if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome." *United States v. Bagley*, 373 U.S. 667, 676, 682 (1985).

EVIDENTIARY HEARING

An evidentiary hearing is required when the Defendant's allegations are based on facts outside the record, or the record is not sufficiently developed to obviate an

evidentiary hearing. *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990), *cert. denied,* 499 U.S. (1991).

The court has reviewed the entire record, including all transcripts, and the Defendant has not raised any issue that cannot be resolved within the record. Therefore, no evidentiary hearing is required.

DISCUSSION

Ground One – Violation of Defendant's Due Process Rights and Ineffective Assistance of Counsel for Failure to Object to Testimony Barred by *Bruton*

Favela contends that counsel was ineffective for failing to object or make proper objections to the testimony of the confidential informant Luis Valenzuela. He argues that when counsel did object, the objections were on the basis of hearsay rather than protecting his client's Confrontation Clause rights delineated in *Bruton*.

In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the Supreme Court held that because of the substantial risk that a jury will use the facially incriminating confession of a non-testifying defendant as evidence of the guilt of his codefendant, admission of the confession in a joint trial violates the Confrontation Clause of the Sixth Amendment. Favela contends the testimony of Luis Valenzuela, a confidential informant, regarding admissions made to Valenzuela by codefendant Benjamin Corral which implicate Favela, violate Favela's confrontation rights.

The facts of this case do not present a confrontation problem. The testimony complained of here deals with conversations between Valenzuela and codefendant

Corral. Corral's pager number was provided to Special Agent Rodriguez by codefendant Ramiro Ramirez, after Ramirez' arrest. Contact was then initiated by Valenzuela who told Corral that Favela had given him the pager number. Corral asked about Favela and Valenzuela stated that he was still under arrest. Valenzuela told Corral that he knew what he did for Favela, as Favela had already told him, "but that we needed to meet in person to see how we could make a business." Reporter's Transcript (RT) 199:6-8.[1] The two arranged a personal meeting at a motel approximately a week following the telephone conversation.

The record reveals that counsel did not object to the above statements. RT 198-199. The Government correctly states that the conversations between Valenzuela and Corral were not offered for the truth of the statements, but to show that Favela and Corral were acquainted. If counsel had objected, the objections would have been overruled because they were not hearsay under Fed.R.Evid. 801(c). Further, Valenzuela's testimony as to his own references to Favela do not violate the Confrontation Clause because he was subject to cross-examination.

The record reveals that Counsel did object, on hearsay grounds, to Valenzuela's testimony with regard to the personal meeting he and Corral arranged during the above-described telephone conversation. Valenzuela testified that Corral informed him that he often transported equipment for Favela, who was a good client of his.

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[1] The interpreter explained that the word "business" could also be translated as a "deal." RT 199:9-10.

Corral expressed a desire to continue this activity with Valenzuela if they could find a location. Corral offered to sell Valenzuela equipment used to manufacture methamphetamine. R.T. 201-203. When counsel objected, the court gave a limiting instruction to the jury, telling them that Corral's statements could only be used against Corral and could not be used against Favela. Counsel's objection was appropriate, and the court's limiting instruction was also correct and appropriate.

Favela vigorously argues that a *Bruton* problem is presented by this testimony. Favela correctly outlines the reach of *Bruton*, however, he incorrectly argues that the facts in this case present a *Bruton* situation. The subject matter of the conversation between Valenzuela and Corral primarily deals with Valenzuela's efforts to purchase equipment and chemicals from Corral to manufacture methamphetamine. Insofar as it involved Favela, it was either not hearsay under Fed.R.Evid. 801(c), or was the subject of a limiting instruction by the court. This testimony does not present a *Bruton* question because it does not involve an out-of-court statement or confession by a nontestifying codefendant that was used as evidence of guilt against this defendant. Nor can the issue be bootstrapped into such an issue because the informant testified about admissions made to him by codefendant Corral who did not testify. The only legitimate objection to such testimony was interposed by counsel, and proper limiting instructions were given by the court.

Favela also argues prosecutorial misconduct in two instances during final argument. First, he contends that Government counsel was obligated to redact Mr. Favela's name when discussing Valenzuela's testimony about his

conversations with Corral. He also argues that Government counsel falsely reiterated testimony of Agent Rodriguez regarding post arrest statements by Benjamin Corral which inculpated Favela.

Because the claim of a *Bruton* violation is without merit, the prosecution was not under an obligation to redact Favela's name in connection with her argument concerning Valenzuela's testimony. In any case, a review of the transcripts of Agent Rodriguez's testimony reveals that Rodriguez testified Corral told Rodriguez he delivered chemicals to the owner of the ranch. R.T. 50-52. Other evidence established that the owner of the ranch was Favela.

The transcript of Counsel's final argument with regard to Benjamin Corral's post arrest statement to Agent Rodriguez does not support the claim that Government counsel falsely reiterated this testimony. The one brief reference to Favela during Government counsel's final argument directed to the evidence against Corral was neither false nor improper. Further, the jury was properly instructed that statements of counsel are not evidence and may not be used in deciding the facts of the case.

For all of the above reasons, the claims of violation of due process and ineffective assistance of counsel on the grounds stated in this claim are denied.

Ground Two – Violation of Fifth and Sixth Amendments and Prosecutorial Misconduct Through Erroneous Admission of Statements by Favela to Agent Rodriguez

Favela argues violation of his constitutional rights when his post-arrest statement to Agent Rodriguez was admitted into evidence.

A review of the record indicates that the day after Favela was arrested, Agent Moses Rodriguez went to the jail to interview him. At trial, Rodriguez testified about this conversation only after Favela testified about the interview on re-direct examination. Rodriguez testified he explained to Favela that he intended to discuss the investigation into the manufacture of methamphetamine at the Dunlap area ranch owned by Favela where a lab was found, as well as manufacturing methamphetamine at other locations. Rodriguez testified that Favela told him that the lab in Dunlap was not his, that it belonged to Antonio Martinez. At that point Rodriguez told Favela that he was going to read him his Miranda rights. Favela then advised Rodriguez that he didn't want to have his Miranda rights read to him, that he wanted to talk off the record, and that he further did not want the interview tape recorded. Rodriguez agreed. Favela then told Rodriguez that the lab at Dunlap belonged to Antonio Martinez, and for running the lab Martinez paid Favela $20,000 every time methamphetamine was manufactured. Favela explained what his duties were in connection with the Dunlap lab. Rodriguez then stated that he knew Favela was responsible for a lab in Snelling. Favela stated that the Snelling lab was his, but again stated that the Dunlap lab was not his – that he just ran it.

Favela then stated he wanted some type of deal. Rodriguez testified that he told Favela he could not promise him anything concerning release or anything else until he talked to the U. S. Attorney. Because Favela would be leaving for arraignment later that day, Rodriguez told Favela he would get an attorney at that time, and Favela could discuss this with his attorney and have his attorney contact Rodriguez and the prosecutor. Just before leaving

the room Favela said, "Don't forget what we talked about. I want to make a deal with you." Rodriguez again told him to talk to his attorney. R.T. 1116-1119.

Favela's testimony on re-direct concerning this conversation presents a different version of what was said. Favela testified that Rodriguez interviewed him at the jail for about 10 to 15 minutes. Rodriguez asked Favela if he would cooperate and promised him a possible release if he cooperated; however, Favela told Rodriguez that he could not give him any information because he didn't know anything. At that point, Favela testified that Rodriguez threatened him and told him that he would be found guilty in court.

Favela claims that the government failed to comply with its mandatory discovery obligations by not producing this incriminatory information at the proper time. Further, the statement was used at trial in violation of Agent Rodriguez' agreement that he would not use the statements against him. He also claims that Favela's trial counsel was ineffective because he erroneously conceded the admissibility of the statement for impeachment purposes.

Favela's claim fails under any of the theories advanced by him. Favela made these same arguments in support of his motion for a new trial, and the court denied the motion. The issues were not appealed, and thus the claims are procedurally defaulted. Procedurally defaulted claims can be raised in habeas only if the defendant can demonstrate either cause and actual prejudice, or that he is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622 (1998). "Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn

their convictions on grounds which could have been raised on direct appeal." *United States v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1995).

With regard to Favela's claim that the government failed to comply with its mandatory discovery obligations by not producing the incriminating statement used to impeach him, that issue was addressed by the trial court in deciding Favela's motion for a new trial. The court determined that defense counsel was aware of the non-Mirandized statements. Defense counsel's representations on this issue were conflicting as to when he was informed of the statements, but the record indicates counsel knew of the statements early in the proceedings when counsel discussed possible cooperation with government counsel well before trial. *See* Order Re: Defendant's Motion for Judgment of Acquittal and/or New Trial, filed March 29, 1995 (Doc. 196), and Declaration of Kathleen Servatius, filed February 28, 1995 (Doc. 172).

Favela's counsel was not ineffective because he conceded the admissibility of the non-Mirandized statements for impeachment purposes. The government did not sue the non-Mirandized statements in their case-in-chief, and the conversation between Favela and Agent Rodriguez was first elicited by defense counsel on redirect. The court allowed Rodriguez to testify about the statements for impeachment purposes. *Walder v. United States*, 347 U.S. 62, 65 (1954) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *See also Harris v. New York*, 401 U.S. 222, 225 (1971).

In its order denying a new trial, the trial court also determined there was no prosecutorial misconduct for the alleged failure to timely disclose the statement. *See* Doc. 196, *supra*.

Favela fails to show any Fifth or Sixth Amendment violation, and the evidence was appropriately admitted for impeachment purposes.

Even if the court were to assume that counsel's performance was deficient, Favela cannot show prejudice. This evidence was not offered until all of the government's evidence had been presented, and there was substantial evidence to support the conviction without considering the this [sic] evidence.

For all of the foregoing reasons, this claim is denied.

Ground Three – Failure of Government to Provide Impeaching Evidence for a Witness

Favela contends that the Government failed to provide impeachment evidence useful for cross examination of witness Marin Leon in violation of its *Brady* obligations. *Brady v. Maryland*, 373 U.S. 83 (1963).

The prosecution's suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or to punishment. *Id.* Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' of a different result is accordingly shown when the

Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). The court must consider whether the material was exculpatory, whether or not it was produced when it should have been and whether the failure timely to produce the exculpatory material mattered. *United States v. Zuno-Arce*, 44 F.3d 1420, 1425 (9th Cir. 1995).

The Government concedes that it did not timely produce reports, the search warrant and the plea agreement in connection with witness Marin Leon's arrest in Escondido, California, in 1992.

A review of the record reveals that Marin Leon testified on direct about his arrest in Escondido in 1992. He testified that he was arrested for possession of 1½ pounds of methamphetamine, and that another 23 pounds of methamphetamine was found in a storage locker. He further testified that as a result of a cooperation agreement with the government he plead guilty to possession of 1½ pounds of methamphetamine and possession of a firearm in federal court and was sentenced to 97 months. R.T. 228-239.

At the morning break, defense counsel reported to the court that the previous day he had asked the prosecutor for the police reports dealing with the Southern California arrest and was told that they had been provided. However, he did not have them, and asked for them again that morning. The Government then provided copies of the search warrant and the police report concerning Mr. Leon. At that time, the court granted counsel a three-day extension of time to cross examine the witness in order for

counsel to review the materials and subpoena and interview the officers involved in the investigation. R.T. 264-266.

During cross-examination of the witness the court ordered the plea agreement, which had been sealed by the court in the Southern District of California, unsealed and defense counsel was given a copy at that time. R.T. 556-558.

The court concludes that no reversible *Brady* error occurred. The impeachment evidence here falls within the *Brady* rule and it was not produced when it should have been, however, it is clear that this failure made no difference in the outcome of the case. Although the disclosure was untimely, the prosecutor did produce all the required evidence. In addition, defense counsel was granted a three-day extension of time to prepare for cross examination. He did not ask for any further time to prepare his defense, nor did he suggest that there was additional information that the government should have provided. He cross examined the witness at length about his arrest in Southern California and about the plea agreement, eliciting information about the favorable treatment he received for his cooperation and testimony. For these reasons the defendant was not prejudiced by the tardy disclosure of these materials by the government.

Nor can it be said that defense counsel's performance in connection with this claim was ineffective. His performance was not deficient as he sought and received the evidence he needed to effectively cross examine Mr. Leon, and, as stated above, no prejudice resulted from the tardy disclosure.

For the foregoing reasons, this claim is denied.

Ground Four – Violation of Due Process by Use of Favela's Statement Against Him

Favela contends that his due process rights were violated when the Government breached a binding promise made by Agent Rodriguez not to reveal the post-arrest statement made by Favela to Agent Rodriguez. The substance of that interview is set out above in this Memorandum at pages 11-12. Favela argues that although the promise to keep the statements off the record was not made by the prosecutor, fair dealing and due process require honoring of a promise made by a government agent just as much as if it were made by the prosecutor. He cites to *Santobello v. New York*, 404 U.S. 257, 262 (1971) in support of this proposition. Favela also suggests that the statement was involuntary and inadmissible for all purposes.

The statements here were not a part of plea negotiations, as was the case in *Santobello* which is relied on by Favela. In its Order Re: Defendant's Motion for Acquittal or New Trial, p. 8, the trial court found no violation of Fed.R.Crim.P. 11(e)(6). The court determined that there was no discussion of a guilty plea but rather an offer to cooperate, and thus the statements do not come under the protections afforded by Rule 11(e)(6).

Favela contends that his statements were coerced by inducements and promises that Agent Rodriguez never intended to fulfill. A review of the record reveals that Rodriguez never promised any inducements for a lesser sentence or release. Rather, he told Favela that he could not promise him anything until he talked to the prosecutor and that Favela would shortly be getting an attorney who should contact the government on his behalf.

The court finds this claim without merit. In addition, as the government correctly points out, even had the court found that the admission of the statements was error, this type of claim, when reviewed pursuant to a § 2255 motion, is governed by the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993), rather than the harmless error standard set out in *Chapman v. California*, 386 U.S. 18 (1967). As stated before, there was substantial evidence supporting the conviction, and the statements were correctly admitted for impeachment purposes. Thus, admission of the statements could not have "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 637.

For the above reasons, this claim is denied.

Ground Five – Ineffective Assistance of Counsel at Sentencing

Favela argues that his counsel was ineffective for failure to require the government to prove the specific type of methamphetamine involved in this case.

This issue was appealed and rejected. *United States v. Favela*, 111 F.3d 139 (9th Cir. 1997) (Table), 1997 WL 168334. Issues which have been raised on direct appeal and decided adversely to a petitioner are not reviewable in the Petitioner's subsequent § 2255 proceeding, absent a showing of manifest injustice or a change in the law. *Polizzi v. United States*, 550 F.2d 1133, 1135-36 (9th Cir. 1976). As stated before, a § 2255 motion may not relitigate issues raised on direct appeal. *Battaglia v. United States*, 428 F.2d 957, 960 (9th Cir. 1970).

Further, the Ninth Circuit has held that counsel's failure to pursue this issue at sentencing does not fall below the objective standard of reasonableness. *United States v. McMullen*, 98 F.3d 1155, 1157-58. Favela appealed on the ground that the district court failed to determine whether he was convicted of manufacturing L-methamphetamine or D-methamphetamine, and the appellate court rejected his challenged. Additionally, in his claim Favela does not assert any facts to show that the methamphetamine involved here was actually L-methamphetamine whereas the chemists' reports in the record state that the substances involved here tested positive for D-methamphetamine.

Accordingly, this claim is denied.

Ground Six – Sentencing Error

Favela claims that the court erred in applying a two-level enhancement in his offense level for possession of a firearm.

Favela is precluded from raising this non-constitutional sentencing error claim for the first time in a § 2255 motion. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995). Favela appealed his sentence only as to the court's determination that he was manufacturing D-methamphetamine. He did not object at sentencing nor on appeal to the two-level enhancement for possession of a weapon. Thus, he has waived the right to object in collateral proceedings. *Schlesinger*, 49 F.3d at 485.

Even if the issue were not waived, the claim is without merit. The enhancement pursuant to 2D1.1(b)(1) was appropriate in these circumstances. Four weapons were

found in the bedroom of the residence on the property which was the site for the methamphetamine lab. Favela was the owner of that property, and the evidence clearly showed he was conducting a drug trafficking business on that property. A large sum of cash was also found. It was therefore reasonable to assume the weapons present were related to offense. *See* U.S.S.G. § 2D1.1. Commentary (n.3). *United States v. Lopez-Sandoval*, 146 F.3d 712, 715 (9th Cir. 1998).

Accordingly, this claim is denied.

Grounds Seven and Eight – Ineffective Assistance of Counsel

Favela claims that his counsel was ineffective when he elicited prejudicial testimony from Agent Rische. He stated that it was clear from counsel's questions that counsel expected the agent to tell the jury that no drugs or weapons were discovered at Favela's McCall Avenue address. Instead, the testimony revealed that 7 grams of methamphetamine were found in a vehicle that was on the property at the time of the search. He admits that on recall, his counsel established that the drugs were found in a truck outside the residence; however he argues that he should have pursued the witness further to establish the identity of the owner or user of the truck. For this reason, he argues that counsel's performance fell below the objective standard of reasonableness.

The court does not agree that counsel's performance was deficient. The testimony of Agent Rische dealt with his participation in the search of Favela's McCall Avenue residence. The government did not elicit any information about drugs because Rische's part in the search dealt with

paper work and identification of Favela and the other individuals present when the search occurred. Defense counsel did not comment on Rische's statement that seven grams of methamphetamine were seized, but continued to have the witness enumerate the items he seized. The cross examination was short and emphasized that the search of Favela's residence did not turn up any cash or drug paraphernalia. In the entire scope of the trial, Riche's testimony on both direct and cross examination takes up only seven and one-half pages of transcript. R.T. 181-188. Counsel's performance was that of an experienced attorney seeking to highlight the positive aspects of this search. Counsel's performance was not deficient.

However, assuming *arguendo* that counsel's performance was deficient, Favela cannot show prejudice. The evidence established that 10-15 pounds of methamphetamine was found at Favela's ranch on Millwood Road. There was further evidence that Favela used the residence at the ranch for illicit activities as well as conducting some legitimate business there. Favela was linked to the property by paperwork and keys. Further, other witnesses established that he was the leader of a methamphetamine manufacturing conspiracy since 1991. The evidence also revealed that Favela received substantial income from his drug activities and he used large amounts to purchase real estate.

Because there was clear and substantial evidence against Favela, admission of this evidence, even if erroneous, could not have had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *See also United States v. Rude*, 88 F.3d 1538, 1553 n.12 (9th Cir. 1996).

Favela also claims ineffective assistance of counsel for failure of counsel to cross-examine Emma Meraz. He argues that such examination would have given rise to an inference that Ms. Meraz had some involvement with the Snelling laboratory, and that there was possibly an agreement with the government.

This situation presents a classic tactical decision. Defense counsel explained his reasons for not cross examining this witness. He was aware of considerable additional negative information that cold have been elicited that was not brought out in Meraz' direct testimony, and he did not want the jury to hear about it. Excerpt of Record on Appeal 751-752. This represents a reasonable tactical decision by counsel.

In claiming ineffective assistance of counsel, the claimant must "overcome a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance; that is, the [claimant] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). *See also Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995) ("Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel.") and *Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984) ("[A] tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel."

For all of the above reasons, these claims of ineffective assistance of counsel are denied.

Ground Nine – Use of Witnesses Receiving Consideration For Their Testimony

Favela claims that it was a violation of 18 U.S.C. § 201(c)(2) for the court to permit testimony from paid informants or from cooperating witnesses receiving lenience in exchange for their testimony.

He relies upon *United States v. Singleton*, 144 F.3d 1343, 1347 (10th Cir. 1998). That decision was withdrawn by the Tenth Circuit, and was never relied upon in the Ninth Circuit. Rather, this circuit has consistently held that the government is not precluded from using paid informants or cooperating witnesses. *United States v. Cuello*, 96 F.3d 1179, 1183 (9th Cir. 1996). In *United States v. Flores*, 172 F.3d 695, 699-700 (9th Cir. 1999) the court stated that at the time of the proceedings in that case no court had ever excluded evidence on the ground that the government violated section 202(c)(2). It acknowledged that the Ninth Circuit had not yet directly considered the issue, but had previously approved of the government's use of incentives to elicit relevant testimony. *See Flores*, 172 F.3d at 700, and citation there listed.

Further, Favela failed to raise this argument both at trial or on direct appeal. "If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error." *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). "Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal." *United States v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985). Because

Favela has failed to show both cause and prejudice, he may not now raise this issue for the first time under § 2255.

For the reasons stated above, this claim is denied.

Therefore, for all of the foregoing reasons,

IT IS HEREBY ORDERED that this motion to vacate, set aside or correct sentence is denied, and the matter is dismissed.

DATED this 20th day of January, 2000.

/s/ M. D. Crocker
M. D. CROCKER
Senior United States
District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GUADALUPE JAIME FAVELA, Defendant-Appellant.	No. 00-15689 D.C. No. CR-98-05530-MDC ORDER (Filed Apr. 10, 2002)

Before GOODWIN and TROTT, Circuit Judges, and EZRA,* District Judge

The panel has voted unanimously to deny the petition for rehearing. Judge Trott has voted to deny the petition for rehearing en banc, and Judges Goodwin and Ezra recommended denial.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

* The Honorable David Ezra, United States Chief District Judge for the District of Hawaii, sitting by designation.